UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE ATLANTA OPERA, INC.,

Case No. 10-RC-276292

Employer,

and

MAKE-UP ARTISTS AND HAIR STYLIST UNION, LOCAL 798 IATSE,

Petitioner.

Defendant-Appellee

BRIEF OF *AMICI CURIAE* THE HONORABLE _____...AS FRIENDS OF THE COURT

Submitted by:

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Amici are ____ Members of the United States House of Representatives concerned with potential overreach by the National Labor Relations Board in the instant case. Congressional members have an interest in ensuring the powers delegated to administrative agencies are consistent with Congressional intent, as the legislative authority vested in the federal government rests with Congress alone. In this case, modification of the existing standards used to evaluate employment status would overstep the Board's role in administering the National Labor Relations Act and encroach upon Congressional authority.

INTRODUCTION

Since 2009, there has been a dispute as to the appropriate lens through which to view the test to determine employment classification. In *FedEx Home Delivery v NLRB*, 563 F. 3d 492, 497 (D.C. Cir. 2009) (*FedEx I*), the D.C. Circuit ruled that employment classification was to be determined through the prism of entrepreneurial opportunity available to a putative employee. The National Labor Relations Board ("NLRB" or "the Board") then attempted to abrogate that standard through its decision in *FedEx Home Delivery*, 361 NLRB 610 (*FedEx Board*) (2014). In that case, the Board held right-to-control factors were the appropriate framework for evaluating employment classification. *Id.* at 621. The D.C. Circuit again rejected this position, and re-asserted the entrepreneurial-opportunity framework as the appropriate standard. *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017) (*FedEx II*). The Board failed to appeal, and shortly thereafter acceeded to reasoning of *FedEx I* and *FedEx II* in its decision in *SuperShuttle DFW, Inc and Amalgamated Transit Union Local 21338*, 367 NLRB 75 (2019). Now, in this case, the Board asks whether to return once more

to the *FedEx Board* standard which has twice been rejected by the D.C. Circuit. It should not do so, and any such attempt is contrary to both law and congressional intent.

LEGAL HISTORY

A. The Common-Law Agency Test

Traditionally, the Board and the courts have relied upon a common-law agency test to determine whether a worker should be classified as an employee or an independent contractor. *NLRB v United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968). Under this approach, the party asserting independent-contractor status has the burden of proof. *SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 21338*, 367 NLRB 75) (collecting cases). A worker's employment status will be analyzed based on the following framework:

(a) The extent of control which, by the agreement, the master may exercise over the details of the work.
(b) Whether or not the employed is engaged in a distinct occupation or business.
(c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
(d) The skill required in the particular occupation.
(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
(f) The length of time for which the person is employed.
(g) The method of payment, whether by the time or by the job.
(h) Whether or not the work is part of the regular businesses of the employer.
(i) Whether or not the parties believe they are creating the relation of master and servant.
(j) Whether the principal is or is not in business.

Id. at 75-76. In conducting this review, no one factor is determinative. Instead, "all the incidents of the relationship must be assessed and weighted with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles." *United Ins. Co.*, 390 U.S. 254, 258 (1968).

B. *FedEx I*: A Refinement of the Standard

The examination of a worker's classification has evolved over time, and while the factors identified above have remained consistent, there has been some variance in the framework through which those factors are examined. The most relevant shift for the purposes of this matter occurred in *FedEx Home Delivery v NLRB*, 563 F. 3d 492 (D.C. Cir. 2009) (*FedEx I*). In that case, the Court highlighted that the appropriate lens through which to evaluate the common-law factors was the extent to which the putative employees enjoyed a "significant entrepreneurial opportunity for gain or loss." *Id.* at 497. The Court, at the Board's urging, recognized that this approach would help clarify close cases:

> "[W]hile the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risk inherently in entrepreneurialism."

Id. It concluded that the test did not allow for simply tallying these factors; instead, a proper review must also be based on a qualitative analysis in the particular circumstance. *Id.* In short, the Court held that the degree of available entrepreneurial opportunity was a "more accurate proxy" for determining whether a putative independent contractor was, in fact, an employee. *Id.* at 507. While the common-law factors remained the core of the independent-contractor analysis, that analysis was now to be viewed through the prism of entrepreneurial opportunity.

C. *FedEx Board*: The NLRB's First Attempt to Abrogate *FedEx I*.

While the *FedEx I* Court established that the entrepreneurial-opportunity principle was necessary to the independent-contractor analysis, the Board later attempted to reject the Court's framing of the issue. In 2014, when deciding *FedEx Board*, the NLRB determined that, contrary to the Court's decision in *FedEx I*, the workers at issue were employees, rather

than independent contractors. *Id.* at 627. In applying *FedEx I* in its *FedEx Board* decision, the Board determined that entrepreneurial opportunity should be analyzed in light of actual, rather than theoretical, opportunity, thereby recasting the Court's entrepreneurial-opportunity framework into a test based on economic realities. *Id.* at 619. To do so, the Board created three right-to-control factors, which it determined were appropriate means to evaluate actual entrepreneurial opportunity, namely: 1) whether a worker has the realistic ability to work for other companies; 2) whether the worker has a proprietary or ownership interest in his or her work; and 3) whether the worker has control over important business decisions such as scheduling, hiring, and equipment purchases. *Id*. at 620-21.

In practice, *FedEx Board* redefined the common-law independent-contractor test into a new test, based almost entirely upon an examination of these newly created right-to-control factors. Indeed, one member of the NLRB wrote in dissent that the Board's decision "fundamentally shifted the independent contractor analysis, for implicit policy-based reasons, to one of economic realities, i.e., a test that greatly diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the significance of 'right to control' factors relevant to perceived economic dependency." *FedEx Board*, 361 NLRB at 629 (Member Johnson, dissenting).

D. *FedEx II*: The D.C. Circuit Affirms the *FedEx I* Standard and Rejects the Board's Attempt to Reform it

In *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017) (*FedEx II*), the D.C. Circuit largely agreed with the dissent in *FedEx Board*, and soundly rejected the Board's interpretation of *FedEx I*. The Court stated:

> It is as clear as clear can be that 'the *same issue* presented in a *later case* in the *same court* should lead to the *same result*." Doubly so when the parties are the same. This case is the poster child for our law-of-the-circuit doctrine, which ensures stability, consistency, and evenhandedness in circuit law. Having chosen not to seek Supreme Court review in *FedEx I*, the Board cannot effectively nullify this court's decision in *FedEx I* by asking a second panel of this court to apply the same law to the same material facts but give a different answer.

FedEx II, 849 F.3d at 1127 (internal citations omitted) (emphasis original). The Court continued by also rejecting the Board's argument that its interpretation of the entrepreneurial-opportunity framework was entitled to administrative deference:

> To be sure, on matters to which courts accord administrative deference, agencies may change their interpretation and implementation of the law if doing so is reasonable, within the scope of the statutory delegation, and the departure from past precedent is sensibly explained. But the Supreme Court held in *United Insurance* that the question whether a worker is an "employee" or "independent contractor" under the National Labor Relations Act is a question of "pure" common-law agency principles "involve[ing] no special administrative expertise that a court does not possess." Accordingly, this particular question under the Act is not one to which we grant the Board *Chevron* deference or to which the *Brand X* framework applies.

Id. at 1128 (internal citations omitted). The D.C. Circuit concluded by reinstating the holding of *FedEx I*, and thereby determining the workers in question were, in fact, independent contractors. *Id.*

E. *SuperShuttle*: The NLRB Embraces the *FedEx I and FedEx II* Standard

The next large-scale review of the independent-contractor analysis occurred when the Board reached its decision in *SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338*, 367 NLRB No. 75 (2019). In that case, this Board reaffirmed its commitment to adhere to the traditional common-law agency test, as established in *United Insurance*. *SuperShuttle*, 367 NLRB No. 75 at p. 8. It clarified, however, that the common-law factors must be viewed through the prism of entrepreneurial opportunity, thereby adopting the reason expressed by

the D.C. Circuit in *FedEx I*. *Id.* at 9. The Board also explicitly rejected viewing entrepreneurial opportunity based on the degree of control factors. *Id.* at p. 20, fn 27.

This incorporation of *FedEx I* did not fundamentally alter the Board's independent-contractor analysis. The Board stated: "[i]ndeed, employer control and entrepreneurial opportunity are two sides of the same coin: the more control, the less scope for entrepreneurial initiative, and visa-versa." *Id.* at p 9). The practical effect of *SuperShuttle* was merely to adopt a mechanism for analyzing the common-law agency factors in a manner that the D.C. Circuit has deemed a "more accurate proxy" to "capture[] the distinction between an employee and an independent contractor." *SuperShuttle*, 367 NLRB No. 75, p. 11. The Board held, consistent with the *FedEx I* and *FedEx II* decisions, that while entrepreneurial opportunity can inform the Board's review of the common-law factors, those factors remain the overarching method of determining employment status:

> As the D.C. Circuit has made clear, the Board does not merely count up the common-law factors that favor independent contractor status to see if they outnumber the factors that favor employee status, but instead it must make a qualitative evaluation of those factors based on the particular factual circumstances of each case. Where a qualitative evaluation of common-law factors show significant opportunity for economic gain (and, concomitantly, significant risk of loss), the Board is likely to find an independent contractor.

Id. at p. 11 (internal citation omitted). The Board concluded by expressly overruling the *FedEx Board* decision as inconsistent with the D.C. Circuit's *FedEx I* and *FedEx II* decisions.

ARGUMENT

A. The *SuperShuttle* Decision has Been Repeatedly Recognized as Consistent with the National Labor Relations Act

As stated by Member Johnson's dissent in *FedEx Board*, that 2014 decision attempted to "fundamentally" redefine the independent-contractor analysis to avoid a review of entrepreneurial opportunity, and was based on "implicit policy-based reasons." While that may be true, it does not capture the full scope of the problem. Namely, that returning the independent-contractor analysis to the *FedEx Board* standard, whether modified or not, would be contrary to law, and risks fundamentally undermining the American economy.

In *Roadway Package Systems, Inc.*, 326 NLRB 842, 849 (1998), the Board noted that the common law of agency was entirely beyond the scope of the NLRB's jurisdiction, stating, "[Supreme Court] cases 'teach us not only that the common law of agency is the standard to measure employee status but also that we have no authority to change it.'" Despite this, the Board has attempted to modify common-law agency principles in favor of its preferred policy outcomes. See, e.g., *FedEx Board*. This attempt to undermine the *SuperShuttle* decision continues this unfortunate trend.

Given that *FedEx I* was the first decision by the D.C. Circuit embracing the entrepreneurial-opportunity framework, it is appropriate to start there. The *FedEx I* Court recognized that the common-law agency test "reflects clear congressional will," and remained the legal core of the independent-contractor analysis. *Id.* at 496. The Court noted, however, that this test was not a purely mechanical one; instead, the common-law factors must be considered through a particular viewpoint to accurately gauge a worker's proper classification. *Id.* at 497. It acknowledged that both itself and the Board had shifted away

from a guiding principle that examined the control exercised by a putative employer in favor of an examination of the entrepreneurial opportunity for gain or loss. *Id.*

This is precisely the standard adopted by the *SuperShuttle* decision. And while the dissent in that decision argues that the *FedEx I* (and by extension *SuperShuttle*) decision improperly distorted the entrepreneurial viewpoint into a single, overarching factor, these arguments are both unconvincing and unfaithful to D.C. Circuit precedence. See, e.g., *SuperShuttle*, 367 NLRB No. 75 at p 16).

As noted by the majority in *SuperShuttle,* entrepreneurial opportunity and control are "two sides of the same coin." *Id.* at 9. Entrepreneurial opportunity, by its very nature, requires a lesser degree of employer control. As such, the overarching shift towards viewing the common-law agency test through the lens of entrepreneurial opportunity merely represented a mechanism to "better capture[] the distinction between an employer and an independent contractor." *Corporate Express Delivery Sys. v NLRB.* 292 F.3d 777, 780 (D.C. Cir. 2002). It is worth noting that this shift was initially accomplished in light of the D.C. Circuit's acceptance of the Board's suggestion that a focus on entrepreneurial opportunity would allow the independent-contractor analysis to be performed more accurately and with greater ease. *Id.* ("Ultimately, however, we need not answer that question because we uphold as reasonable the Board's decision, *at the urging of the General Counsel*, to focus not upon the employer's control of the means and manner of the work but instead upon whether putative independent contractors have a 'significant entrepreneurial opportunity for gain or loss.'") (emphasis added).

In departing from the *FedEx I* standard in *FedEx Board*, the Board over-emphasized the question of whether a worker was rendering services as part of an independent business. See, e.g. *FedEx Board*, 361 N.L.R.B. at 610. In doing so, the Board conflated the *Fed Ex I*

Court's position that the existing common-law factors could be framed by an examination of entrepreneurial opportunity with an endorsement of the position that the only relevant consideration was the extent to which work was free from control. In *SuperShuttle*, the Board noted that the *FedEx I* Court had rejected this position, instead evaluating the common-law factors, as framed by the guiding principle of entrepreneurial opportunity:

> Indeed, the court applied and considered all of the relevant common-law factors, including whether the parties believe they are creating a master/servant relationship, the extent of the employer's control over details of the work, the extent of employer supervision, and who supplies the instrumentalities for doing the work, before concluding that, 'on balance, … they favor independent contractor status.

SuperShuttle, 367 NLRB No. 75, at p. 8, quoting *FedEx I*, 563 F.3d at 504. Additional language from *FedEx I* makes clear that the court did not believe any single factor, including the degree of work performed as part of an independent business, could be dispositive: "[T]he ten-factor test is not amenable to any bright-line rule…there is no shorthand formula or magic phrase that can be applied to find the answer, but all the incidents of the relationship must be assessed and weighed with no one factor being decisive." *FedEx I*, 563 F.3d at 496, (quoting *United Ins. Co.*, 390 U.S. at 258). This statement inherently encompasses the entrepreneurial-opportunity principle, which is used as a means to evaluate the common-law factors. This is in contrast to the right-to-control factor as established in *FedEx Board*, which essentially created a new, mechanical, bright-line test for determining employment classification. In so doing, the *FedEx Board* decision, and any subsequent return thereto, is contrary to law.

B. Precedent shows that *SuperShuttle Should* be Upheld, as Attempts to Abrogate the Principles it Expresses have Repeatedly Failed.

A focus on entrepreneurial opportunity has proven itself to be both workable and legally defensible. Indeed, subsequent attempts to focus the analysis differently have failed. In 2014, when the Board attempted to reverse the *FedEx I* court through its *FedEx Board* decision, it was soundly rejected. *FedEx II*, 849 F.3d at 1127-28. The Court made its thoughts about the Board's policy reversal clear, recognizing that it must uphold the *FedEx I* decision based not only on its legal conclusions, but also the law-of-the-case doctrine. *Id.* The Court acknowledged the "importance of stability, consistency, and evenhandedness" in circuit court decisions, explicitly ruling that an identical legal issue should produce identical results. *Id.* The Court stated that the Board, "[h]aving chosen not to seek Supreme Court review in *FedEx I*," could not "effectively nullify [that decision] by asking a second panel to apply the same law to the same material facts but give a different answer." *Id.* The Court also rejected the Board's protestations that its decisions should be afforded administrative deference, recognizing that the appropriate independent-contractor analysis was a purely legal issue squarely within the Court's purview. *Id.* And the Court has already ruled that the appropriate standard is one that analyzes the traditional factors of agency law, viewed through a prism of entrepreneurial opportunity. *Id.* at 1126. It stands to reason that, if asked to review this issue a third time, the Court will similarly reject another attempt to overrule the standards established by *FedEx I* and *II* and acceded to by the Board in *SuperShuttle*.

The Board should uphold the *SuperShuttle* decision, both to ensure stability and continuity in the law, and because that position has been expressly endorsed by the relevant appellant court. Failure to do so would be tantamount to the Board abandoning its duty to

faithfully apply the rule of law, and instead represent the application of policy-based decision-making.

C. A Return to the *FedEx Board* Standard for Independent Contracting is Expressly Contrary to the Will of the People as Expressed by Congress

Abrogating the *SuperShuttle* standard would be directly contrary to the will of the people as expressed by Congress. By limiting the employment-classification test to one that only analyzes the extent of control exercised by a putative employer, the Board would return what is, at its core, an economic-realities test twice rejected by the D.C. Circuit. To the extent this is the path the Board takes in this case, it will be adopting a position rejected by Congress, and therefore the American people, for over 70 years.

Evaluating employment status on the basis of economic realities was initially endorsed by the Supreme Court in *U.S. v Silk*, 331 U.S. 704 (1947). In that case, the Court relied on economic realities to determine that putative independent contractors were, in fact, employees. In so doing, the Court ignored the common-law agency test, in favor of policy-based reasoning, stating:

> The word "employee," we said, was not [used in the NLRA] as a word of art, and its content in its context was a federal problem to be construed "in light of the mischief to be corrected and the end to be attained." We concluded that, since that end was the elimination of labor disputes and industrial strife, "employees" included workers who were such as a matter of economic reality. The aim of the [NLRA] was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions. We rejected the test of the "technical concepts pertinent to an employer's legal responsibility to third persons for the acts of his servants." This is often referred to as power of control, whether exercised or not, over the manner of performing service to the industry. We approved the statement of the National Labor Relations Board that 'the primary consideration in the determination of the applicability of the

> statutory definition is whether effectuation of the declared policy and purposes of the Act comprehended securing to the individual the rights guaranteed and protection afforded by the Act.

Id.. at 713. In adopting this approach, the Court concluded that "employee" was not a term of art for the purpose of the NLRA, and, relying on an economic-realities test similar to that later endorsed by the *FedEx Board* decision, found that workers who would be independent contractors under common-law principles could, in fact, be employees under the NLRA.

That same year, Congress amended the NLRA to nullify the *Silk* decision explicitly excluding independent contractors from being covered by the Act. National Labor Relations Act, 29 U.S.C. §152(3) (excluding independent contractors from the definition of "employee"). Subsequent Supreme Court decisions took note of this fact, acknowledging that Congress had acted to abrogate any policy-based alternatives to the common-law agency test. In *Nationwide Mutual Ins. Co. v Darden*, 503 U.S. 318 (1992), the Supreme Court stated, when evaluating decisions predating Taft-Hartley, "[i]n each case, the Court read 'employee' to imply something broader than the common-law definition; after each opinion Congress amended the statute so construed to demonstrate that the usual common-law principles were key to the meaning." *Id.* at 324.

The practical effects of the Taft-Hartley amendments, and subsequent Supreme Court cases, was a recognition that an expansive, policy-based definition of employee was forbidden by Congress. It was recognized that Congress had acted to clarify that the employment test was to be based on an analysis of the common-law factors. *SuperShuttle* is consistent with these principles, as it merely provides a framework that can be used to clarify the application of those factors. If, however, the Board were to return to the *FedEx Board* standard, it would be adopting a test that runs contrary to not only legal precedent, but also the longstanding will of Congress.

D. Abrogating *SuperShuttle* is not Sound Policy

Given that returning to the standards established by *FedEx Board* is contrary to both legal precedent and Congressional will, there is no valid justification for abrogating *SuperShuttle*. Nevertheless, even if such a reversal were legally permissible, it would be contrary to sound public policy.

The *FedEx Board* decision appears to have been designed to limit an employer's ability to classify workers and independent contractors. See, e.g., *FedEx Board*, 361 NRLB at 629 (Member Johnson, dissenting). In that decision, the Board seemed to assume that classifying workers as independent contractors is inherently harmful to those workers. *Id.* This assumption is not shared by the majority of those who rely on independent contracting as their preferred way of earning a living. Even if it were, it is Congress' prerogative, not the Board's, to determine an appropriate remedy.

The data shows that independent contracting is not detrimental, but rather a popular and growing segment of American workers. Fewer than 10% of workers currently classified as independent contractors want to be reclassified.[1] Perhaps even more noteworthy is the fact that the largest share of workers who act as independent contractors are in the top quartile of earnings when compared to traditional employees.[2] Independent contracting also supports the income of those in the bottom quartile of earnings, which are the fastest growing

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[1] Press Release, U.S. Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements News Release (June 7, 2018), https://www.bls.gov/news.release/conemp.htm.
[2] Lim, Miller, et. al, *Independent Contractors in the U.S.: New Trends from 15 Years of Administrative Tax Data*, p. 16, U.S. Department of Treasury (2019) https://www.yalelawjournal.org/files/Vol.130StyleGuide_focy11oh.pdf. b

group of independent contractors.[3] Further, independent contracting has proven particularly popular among women, who have seen more growth in income than men.[4] In short, independent contracting has proven to be a popular and effective way to maximize earning potential and economic mobility.

The Board should not now, as a matter of policy, restrict the ever-increasing opportunity enjoyed by those who seek the flexibility of a career based on independent contracting. Millions of Americans have made the choice to be their own bosses, and to set their own schedules and pay. The Board should not impede the choices of these workers by returning to a standard that Congress rejected 75 years ago. The responsibility for such a fundamental change in labor policy rests with Congress, and the Board should not overstep its statutory authority by attempting to usurp that responsibility.

CONCLUSION

Since 1947, Congress has clearly expressed its will that neither the Board, nor the Courts, have the authority to adopt an employment classification test that differs from common-law principles. Such authority rests exclusively with Congress itself. U.S. Const. art. 1, § 1. Despite this, this Board is now attempting, for a second time, to develop an alternative test that would, in practice if not by design, subordinate the common-law factors to achieve desired policy outcomes. The Board is bound to maintain the holdings of *FedEx I* and *FedEx II* as adopted in the *SuperShuttle* decision in keeping with the expressed will of Congress and binding D.C. Circuit

[3] *Id.*
[4] *Id.*

precedent. To the extent that changes to the standard outlined in those cases are to occur, they must be made legislatively, rather than through the decisions of this Board. As such, we respectfully request that the Board uphold the *SuperShuttle* decision without modification.

Respectfully Submitted,

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Dated: February ___, 2022